

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

ANNIE WORTHAM

PLAINTIFF

vs.

Civil Action No. 1:96cv380-D-D

VALERIE ALDERFER, as defendant ad litem
for deceased, Harold M. Wortham, Jr.

DEFENDANTS

MEMORANDUM OPINION

By order dated November 12, 1996, United States District Judge Stephen N. Limbaugh of the Eastern District of Missouri transferred this cause to this district. On February 25, 1997, the defendant Valerie Alderfer filed with this court a Motion to Dismiss, or in the Alternative, to Strike. The primary contention of the defendant in her motion is that she is not a proper defendant in this action, as her capacity to be sued is based upon what she contends to be an inapplicable Missouri state statute. In the alternative, the defendant requests that this court strike from the plaintiff's pleadings any reference pertaining to the existence of liability insurance in this cause. Upon consideration of the motion to dismiss, the court finds that it is not well taken and shall deny it. As to her request for alternative relief, however, the court finds the motion well taken and shall grant it.

. Factual Background

On or about June 26, 1993, a motor vehicle accident occurred in Chickasaw County, Mississippi. The wreck involved an automobile driven by Harold M. Wortham, Jr., and in which the plaintiff, Annie Wortham, was a passenger. As a result of the accident, the plaintiff suffered various injuries. Harold Wortham died intestate in the state of Missouri on or about June 28,

1994. On or about May 15, 1996, Plaintiff's counsel petitioned the Missouri state courts to open an administration of Mr. Wortham's estate for the purpose of pursuing an action for injuries suffered as a result of the wreck. The Missouri courts denied the request, as barred by Missouri's statute of limitations on the administration of estates.

As a consequence, the plaintiff filed this action against the defendant in the United States District Court for the Eastern District of Missouri and petitioned the court to appoint the defendant as a "defendant ad litem" pursuant to Missouri statutory law. Mo. Ann. St. § 537.021. After the court granted the motion and appointed Ms. Alderfer, the plaintiff, in an unusual procedural move, then moved to transfer the action to this court pursuant to 28 U.S.C. § 1404(a). The district court granted the motion and transferred this cause to the Northern District of Mississippi. After transfer, the defendant filed the motion presently before the court.

. Discussion

. Standard for a Motion to Dismiss

A Rule 12(b)(6) motion is disfavored, and it is rarely granted. Clark v. Amoco Production Company, 794 F.2d 967, 970 (5th Cir. 1986); Sosa v. Coleman, 646 F.2d 991, 993 (5th Cir. 1981). Dismissal is never warranted because the court believes the plaintiff is unlikely to prevail on the merits. Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). Even if it appears an almost certainty that the facts alleged cannot be proved to support the claim, the complaint cannot be dismissed so long as the complaint states a claim. Clark v. Amoco Production Company, 794 F.2d 967, 970 (5th Cir. 1986); Boudeloche v. Grow Chemical Coatings Corp., 728 F.2d 759, 762 (5th Cir. 1984). "To qualify for dismissal under Rule 12(b)(6), a complaint must on its face show a bar to relief." Clark, 794 F.2d at 970; see also

Mahone v. Addicks Utility District, 836 F.2d 921, 926 (5th Cir. 1988); United States v. Uvalde Consolidated Independent School District, 625 F.2d 547, 549 (5th Cir. 1980), cert. denied, 451 U.S. 1002. Dismissal is appropriate only when the court accepts as true all well-pled allegations of fact and, "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Thomas v. Smith, 897 F.2d 154, 156 (5th Cir. 1989)(quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 100-02, 2 L.Ed.2d 80 (1957)); see Mahone v. Addicks Utility District, 836 F.2d 921, 926 (5th Cir. 1988); McLean v. International Harvester, 817 F.2d 1214, 1217 n.3 (5th Cir. 1987); Jones v. United States, 729 F.2d 326, 330 (5th Cir. 1984). While dismissal under Rule 12(b)(6) ordinarily is determined by whether the facts alleged, if true, give rise to a cause of action, a claim may also be dismissed if a successful affirmative defense appears clearly on the face of the pleadings. Clark v. Amoco Production Company, 794 F.2d 967, 970 (5th Cir. 1986); Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir. 1982), cert. denied, 459 U.S. 1105.

. The Conflicts Dilemma

In her complaint, the plaintiff charges that the defendant is properly named in this action as a "defendant ad litem." This designation does not derive from federal law, but from Missouri statutory law. R.S. Mo. § 537.021. The relevant statute provides:

537.021. Action for damages - - personal representative to maintain or defend - -
exception - - action against liability insurer, procedure

1. The existence of a cause of action for an injury to property, for a personal injury not resulting in death, or for wrongful death, which action survives the death of the wrongdoer or the person injured, or both, shall authorize and require the appointment by a probate division of the circuit court of:

. . .

(2) A personal representative of the estate of a wrongdoer upon the death of such wrongdoer; provided that, if a deceased wrongdoer was insured against liability for damages for wrongdoing and damages may be recovered from the wrongdoer's liability insurer, then the court in which any such cause of action is brought shall appoint at the request of the plaintiff or other interested party a qualified person to be known as a defendant ad litem. *The defendant ad litem when so appointed shall serve and act as the named party defendant in such actions in the capacity of legal representative of the deceased wrongdoer* and such appointment and any proceedings had or judgment rendered in such cause after such appointment shall be binding on the insurer of such deceased wrongdoer to the same extent as if a personal representative had acted as the legal representative of such deceased wrongdoer in such cause of action.

Mo. Ann. Stat. § 537.021 (West 1996) (emphasis added). The question essential to the determination of the defendant's motion is whether § 537.021 is applicable to permit a "defendant ad litem" to be employed in this case.

Federal Rule of Civil Procedure 17(b) provides in relevant part:

(b) Capacity to Sue or be Sued. The capacity of an individual, *other than one acting in a representative capacity*, to sue or be sued shall be determined by the law of the individual's domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. *In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held . . .*

Fed. R. Civ. P. 17(b) (emphasis added). As this case involves a defendant's capacity to be sued in a representative capacity, *i.e.*, as a defendant ad litem, the law of the state in which the district court is held governs the capacity of Ms. Alderfer to be a defendant in this action. In cases such as this one, which have been transferred to a different district court pursuant to 28 U.S.C. § 1404(a), the "law of the state in which the district court is held" means the state law of the transferor court. See, e.g., Ferens v. John Deere Co., 494 U.S. 516, 108 L.Ed.2d 443, 110 S.Ct. 1274 (1990); Van Dusen v. Barrack, 376 U.S. 612, 11 L.Ed.2d 945, 84 S.Ct. 805 (1964); That state's law is applied regardless of which party effectuated the § 1404(a) transfer, and includes the application of that state's conflict of law rules. Ferens, 494 U.S. at 518, 110 S.Ct. at

1277, 108 L.Ed.2d at 449-50; Van Dusen, 376 U.S. at 637, 84 S.Ct. at 819, 11 L.Ed.2d at 962.

This court's task, then, is to decide whether Missouri conflicts of law rules allow the application of § 537.021 under the facts presently before the court.

For the determination of conflicts issues, Missouri appears to follow the Restatement (Second) of Conflicts in many respects. See, e.g., CIT Group/Equipment Financing, Inc. v. Integrated Financial Services, Inc., 910 S.W.2d 722, 728 (Mo. Ct. App. 1995) (applying § 145 of Restatement in tort case) D.L.C., et al. v. Walsh, 908 S.W.2d 791, (Mo. Ct. App. 1995) (same); Bonner v. Automobile Club Inter-Ins. Exchange, 899 S.W.2d 925, 928 (Mo. Ct. App. 1995) (applying § 188 of second Restatement in contracts case); Ernst v. Ford Motor Co., 813 S.W.2d 910, 921 (Mo. Ct. App. 1991) ("Missouri follows the Restatement (Second) of Conflicts of Law (1971) in determining contract actions."). The most applicable provision of the restatement in this situation appears to be § 125, which provides that "[t]he local law of the forum determines who may and who must¹ be parties to a proceeding unless the substantial rights and duties of the parties would be affected by the determination of this issue." Restatement (Second) of Conflicts, § 125. The traditional common law conflicts analysis, however, draws a distinction between "substantive" matters and those which are "procedural." 16 Am.Jur.2d *Conflict of Laws* § 118 (1979); HERBERT F. GOODRICH & EUGENE F. SCOLES, CONFLICT OF LAWS 142 (1964). Under a substantive/procedural dichotomy, forum or "local" law controls all matters which are deemed "procedural" for conflicts purposes. Even though Missouri has applied the Second Restatement in several contexts, the Missouri courts embrace this venerable distinction and employ a

¹ While this provision appears to be more precisely directed toward the issue of necessary and proper parties to an action, the undersigned finds that § 125 would also apply to the situation at bar if the Restatement alone were to govern in this instance. See Fed. R. Civ. P. 19 (regarding necessary parties to an action).

substantive/procedural dichotomy. See, e.g., D.L.C., 908 S.W.2d at 794 ("A fundamental principle of conflicts is that a forum state will always apply forum procedure, but it will choose the applicable substantive law according to its own conflicts of law doctrines.") (quoting Ernst v. Ford Motor Co., 813 S.W.2d 910, 921 (Mo. Ct. App.1991)); Harter v. Ozark-Kenworth, Inc., 904 S.W.2d 317, 320 (Mo. Ct. App. 1995); Brumbaugh v. Travelers Indem. Co., 396 S.W.2d 740, 741 (Mo. Ct. App. 1965). Forum law will govern not only in matters of procedure, but also in matters pertaining to an available remedy. See, e.g., Robinson v. Gaines, 331 S.W.2d 653, 655 (Mo. 1960) (noting that "the law of the forum governs matters pertaining to the remedy and the procedure"); Hulen v. American Oil Co., 360 S.W.2d 726, 728 (Mo. Ct. App. 1962) (same); Auffenberg Lincoln-Mercury v. Wallace, 318 S.W.2d 528, 531 (Mo. Ct. App. 1958). Caselaw in Missouri regarding how the courts in that state are to delineate between the categories in the conflicts context is, nevertheless, difficult to locate. The general rule is that:

The distinction between substantive law and procedural law is that "substantive law relates to rights and duties which give rise to a cause of action," while procedural law "is the machinery for carrying on the suit."

O'Leary v. Illinois Terminal R.R. Co., 299 S.W.2d 873, 877 (Mo. 1957) (quoting Barker v. St. Louis County, 104 S.W.2d 371, 378 (Mo. 1937)). Missouri courts have utilized this same distinction in other contexts. See, e.g., Wilkes v. Missouri Highway and Transportation Commission, 762 S.W.2d 27, 28 (Mo. 1988); In re Marriage of Bloom, 926 S.W.2d 512, 514 (Mo. Ct. App. 1996); Fletcher v. Second Injury Fund, 922 S.W.2d 402, (Mo. Ct. App. 1996).

In applying this distinction, the Missouri Supreme Court has previously determined that Louisiana's then-existing "direct action" statute was procedural and therefore not applicable to a case filed in Missouri court but governed by Louisiana substantive law. Noe v. United States

Fidelity & Guar. Co., 406 S.W.2d 666, 668 (Mo. 1966). In Noe, the court noted that "we are immediately impressed with the fact that [the Louisiana direct action statute] does not in express terms impose liability on or create a new cause of action against the insurer. Instead, it purports to create a method or procedure for enforcing in the courts of that State the cause of action which came into being by the tortuous act of the insured." Noe, 406 S.W.2d at 668. When looking to § 537.021, the undersigned finds a striking similarity to a direct action statute in this regard.

Contrary to the defendant's assertions, the section does not itself create a new cause of action, but rather is applicable only when a cause of action already exists. In particular, the statute's terms may only be utilized when the plaintiff possesses "a cause of action for an injury to property, for a personal injury not resulting in death, or for wrongful death, which action survives the death of the wrongdoer or the person injured." Mo. Ann. Stat. § 537.021(1) (West 1996). It is simply a remedial vehicle for the prosecution of existing choses of action. As such, § 537.021 is procedural for conflicts purposes under Missouri law.² That the provision extends the "life" of the plaintiff's cause of action does not mean that a new action has been created. If this were true, then the defendant's argument would mandate a finding that statutes of limitation are substantive under Missouri law, contrary to existing caselaw. Brown v. Ozark Christian Schools of Neosho, 847 S.W.2d 888, 892 (Mo. Ct. App. 1993) (noting statutes of limitation are normally procedural as they affect only the availability of a remedy and not the existence of a right to recovery).

The defendant also argues that the plaintiff's claim would have been extinguished at the death of Harold Wortham, Jr. except for the existence of § 537.02. Therefore, the defendant

² The court notes that Missouri courts apparently deem § 537.02 procedural in at least some contexts. See, e.g., Smith v. Tang, 926 S.W.2d 716, 720 (Mo. Ct. App. 1996) (Blackmar, J., dissenting) (naming § 537.021 as procedural without explanation); Pfeffer v. Kerr, 693 S.W.2d 296, 299 n.1 (Mo. Ct. App. 1985) (categorizing § 537.021 "a procedural part of the Wrongful Death Act.").

continues, the provision is substantive as it creates a cause of action against the defendant.

Section § 537.02 does not permit the plaintiff's cause of action to survive the death of the tortfeasor in this case - rather, it provides a procedural mechanism to recover for an action which by virtue of some other law "survives the death of the wrongdoer or the person injured."

Missouri's survival statute, Mo. Stat. Ann. § 537.020, is indeed substantive under Missouri law for conflicts purposes. See, e.g., Stemley v. Downtown Medical Building, Inc., 762 S.W.2d 43, 47 (Mo. 1988) ; Missouri v. Hollenbeck, 394 S.W.2d 82, 90 (Mo. Ct. App. 1965); Mennemeyer v. Hart, 221 S.W.2d 960, 963 (Mo. 1947) ("A statute providing for the survival of an action is held to create a substantive right, not a rule of procedure."). That statute is not applicable in this case. Rather, the determination of whether a cause of action against Mr. Wortham survives his death is governed by Mississippi³ substantive law. Miss. Code Ann. § 13-3-63 (Supp. 1996); see also Miss. Code Ann. § 91-7-225.⁴

. Defendant's request for alternative relief

In the alternative, the defendant requests that this court strike any reference in this cause

³ Both parties appear to agree that pursuant to the application of Missouri conflicts of law principles, Mississippi substantive law governs this action. See, e.g., D.L.C., 908 S.W.2d at 794; Harter, 904 S.W.2d at 320; Wallace v. Washington, 863 S.W.2d 373, 374 (Mo. Ct. App. 1993).

⁴ That statute provides in relevant part that with regard to any action or proceeding against a nonresident of Mississippi arising "out of any accident or collision in which said nonresident may be involved while operating a motor vehicle on [a Mississippi] street, road or highway:"

Any cause of action arising out of such accident or collision against any such nonresident, in case of the death of such nonresident, shall survive against his administrator, executor or other legal representative Miss. Code Ann. § 13-3-63 (Supp. 1996). The substantive import of § 13-3-63 is to provide for the survival of certain causes of action against a decedent. The substantive aspect of this provision, which sets forth that the action survives as against an "executor administrator, or other legal representative" is augmented in this case by the application of Missouri's *procedural* statute allowing for the appointment of a defendant ad litem against whom the plaintiff may pursue her claims. The right to sue is created by the substantive provision § 13-3-63, while the mechanism for the enforcement of that right is created by the procedural provision § 537.021.

to liability insurance. See Fed. R. Evid. 411. The plaintiff does not oppose this aspect of the defendant's motion, and the court finds it well taken. The existence of liability insurance is not a matter properly considered by a trier of fact in determining the merits of this cause, and the court shall strike all references in the pleadings to liability insurance and to the defendant ad litem's employment with American Family Life Insurance Company.

III. Conclusion

The motion of the defendant to dismiss the plaintiff's claims against her shall be denied. Missouri conflicts of law rules govern in this action, and an application of those rules result in Missouri procedural law governing in this case. As Mo. Ann. St. § 537.021 is a procedural provision, its terms allow the appointment of a defendant ad litem in this cause. As to the defendant's request for alternative relief, however, the court finds the motion well taken and shall grant it.

A separate order in accordance with this opinion shall issue this day.

This the _____ day of April 2001.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

ANNIE WORTHAM

PLAINTIFF

vs.

Civil Action No. 1:96cv380-D-D

VALERIE ALDERFER, as defendant
ad litem for deceased, Harold M. Wortham, Jr.

DEFENDANTS

ORDER

Pursuant to a memorandum opinion issued this day, it is hereby ORDERED THAT:

- 1) the motion of the defendant to dismiss this action is hereby DENIED;
-) the defendant's alternative motion to strike is hereby GRANTED; all references contained in the pleadings with regard to the existence of liability insurance and to the defendant ad litem's employment with American Family Life Insurance Company are hereby struck from the pleadings. The plaintiff shall, within thirty (30) days of the date of this order, file amended pleadings in compliance with the terms of this order.

SO ORDERED, this the _____ day of April 2001.

United States District Judge